

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024

Questions on notice to the Australian Human Rights Commission

During the hearing of the Committee on 20 May 2024, Mr Josh Wilson MP asked the following question:

I'm interested in whether, if this law were to persist, you think that making those changes, either instead of or in addition to the other recommendations you've made, would be worthwhile. And I ask you just to take it on notice perhaps to supply to us in writing what those additional measures or changes to the UK law are.

The answer to that question is as follows:

The Australian Human Rights Commission considers that the approach adopted to equivalent 'declared areas' provisions in the United Kingdom achieves a better balance between the aim of discouraging people from traveling to conflict areas as foreign fighters, and the desirability of not criminalising presence in a declared area if a person has a legitimate reason for being there. The Commission recommends that the UK approach be considered as an alternative to its current recommendations 3 and 4, and be combined with the pre-authorisation regime in the Commission's recommendation 5.

Background

In 2019 the Parliament of the United Kingdom passed the *Counter-Terrorism and Border Security Act 2019* (UK). One aspect of that Act was to amend the *Terrorism Act 2000* (UK) by inserting ss 58B and 58C. Section 58B creates an offence of entering or remaining in a 'designated area'. Relevantly, there three defences built into s 58B. Those are:

- It is a defence for the person charged to prove that they had a **reasonable excuse** for entering, or remaining in, the designated area.
- A person does not commit the offence if:
 - (a) the person is already travelling to, or is already in, the area on the day on which it becomes a designated area, and
 - (b) the person **leaves the area within one month**.

- A person does not commit the offence if:
 - (a) the person enters, or remains in, a designated area **involuntarily**,
or
 - (b) the person enters, or remains in, a designated area for or in
connection with one or more of the **purposes mentioned** in
subsection (5).

The purposes set out in subsection (5) are similar to the list of eight permitted purposes under s 119.2(3) of the *Criminal Code Act 1995* (Cth).

Section 58C permits the Secretary of State to designate an area outside of the United Kingdom as a 'designated area' if the Secretary is satisfied that it is necessary, for the purpose of protecting members of the public from the risk of terrorism, to restrict United Kingdom nationals and United Kingdom residents from entering, or remaining in, the area. A declaration ceases to have effect after three years, but further declarations can be made.

Human rights considerations

Prior to the introduction of these provisions in the UK, an Assistant Commissioner (Specialist Operations) of the Metropolitan Police had argued for 'an Australian-style "designated area" offence'.¹ The provisions were clearly drafted with the Australian declared areas provisions in mind, but with further safeguards to protect individual rights. It seems clear from other extrinsic material that these additional safeguards were considered necessary for the United Kingdom to comply with its human rights obligations.

At the time these provisions were proposed, the UK Home Office prepared a memorandum examining the extent to which the provisions were compatible with the European Convention on Human Rights. Relevant extracts from that memorandum are set out below:²

¹ Letter from the Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, to Nick Thomas-Symonds MP dated 6 September 2018, at <https://assets.publishing.service.gov.uk/media/5b964ae0ed915d4d56171f0d/Letter-from-the-Security-Minister-to-Nick-Thomas-Symonds-MP.pdf>.

² Supplementary Memorandum by the Home Office, Counter-Terrorism and Border Security Bill, 5 September 2018, at <https://assets.publishing.service.gov.uk/media/5b964a8a40f0b6558ac43b80/Supplementary-ECHR-memo-Commons-Report-designated-area-offence.pdf>.

The mischief that this offence is designed to address is the phenomenon of UK nationals or residents travelling to parts of the world, such as parts of Syria or Iraq, where there is a heightened risk that they may become involved in, or train in techniques useful for, terrorism. Such persons represent risks to the public (both in the UK and elsewhere) because they may perpetrate terrorist attacks themselves or encourage third parties to do so.

The objective of this new offence is to dissuade UK nationals and residents from entering, or remaining in, areas outside the UK where they may engage in terrorism or other conduct which makes them become a more significant source of risk to the public, and to ensure that those who do so may be prosecuted and, if convicted, sentenced. This is sufficiently important to justify the limitation of the fundamental rights under Articles 8, 9 and 10 and any discriminatory effects in relation to the exercise of those rights within Article 14.

The new offence is rationally connected to the objective since the criminalisation of conduct will deter those tempted to travel and ensure that prosecution will follow if they do so **without reasonable excuse**.

Criminalisation of entry into, or remaining in, designated areas **is no more than necessary to accomplish the objective**. The power to designate must be exercised rationally and proportionately. Any designation made must be kept under review and revoked to the extent that the basis for designation ceases to apply. Designation decisions must be approved by Parliament and would be amenable to judicial review.

Further, if a person has a reasonable excuse for entering, or remaining in, a designated area, they will be able to avail themselves of the defence. In practice, this will mean that in cases where a person legitimately enters or remains in, a designated area, the evidential limb of the Crown Prosecution Service's Full Code Test for bringing criminal proceedings will not be met. ...

A fair balance has been struck between the rights of the individual and the interests of the community. The gravity of the risks posed to the public by United Kingdom nationals and residents who, without reasonable excuse, travel to parts of the world designated by the Secretary of State is such that it is proper to curtail the Article 8, 9 and 10 rights of those persons, and notwithstanding the potential for discriminatory outcomes prohibited by Article 14.

The offence is sufficiently prescribed by law since it will be made clear to members of the public by means of the designation regulations where in the world it is a criminal offence to enter or remain. This will mean

members of the public are capable of regulating their conduct so as to remain on the right side of the law.

The offence is drafted in contemplation of the possibility that people may be en route to an area at the time it is designated, or may already be in it at such time. To prevent such people, who may be unaware of the designation, from immediately being liable, the offence provides a one month grace period for people to leave the area before the offence bites on them. ...

There is no requirement flowing from the Convention to prescribe those reasons for entering, or remaining in, a designated area which will constitute reasonable excuses; many criminal laws include reasonable excuse defences and leave the question of whether a reasonable excuse exists to be determined by the jury on the facts of each case.

(emphasis added)

It seems clear from this analysis that the full range of defences available in the UK law was considered important, and necessary, in demonstrating that the law was proportionate to its object. Particular emphasis was given to the defence of reasonable excuse, which was sufficient to encompass any legitimate excuse and not merely a pre-defined subset of legitimate excuses identified by statute.

The Commission's primary submission is that the declared areas provisions should be repealed (see the Commission's letter dated 29 April 2024, recommendation 1).

The Commission's recommendations 3 and 4 represent different ways of ensuring that a person is not subject to prosecution for being in a declared area for a legitimate purpose.

The Commission considers that a further alternative to recommendations 3 and 4 would be to adopt each of the defences in s 58B of the *Terrorism Act 2000* (UK) identified above, namely, defences of:

- reasonable excuse
- a one month grace period
- involuntariness, and
- a list of specified permitted purposes.

As noted by the Human Rights Commissioner during the hearing, this approach could usefully be complemented by the approach set out in recommendation 5, namely the pre-authorisation approach previously

recommended by the PJCIS. The combination of these two approaches: a general 'reasonable excuse' defence and the availability of pre-authorisation, would significantly improve the current scheme by ensuring that individuals were not liable to punishment when they were in a declared area for a legitimate reason, and allowing people to obtain some certainty in advance of travelling to a declared area that they would not be subject to prosecution. The Commission considers that there is value in retaining the specific permitted purposes for additional certainty while allowing a more general defence of 'reasonable excuse' to cover legitimate purposes not included in the defined list.